

Internal Revenue Service  
**memorandum**

CC:TL:Br3

CLRobertson, Jr.

date: JUN 16 1989

to: District Counsel, Cincinnati CC:CIN  
Attention: Robin Herrell

from: Assistant Chief Counsel (Tax Litigation) CC:TL

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subject: Coordination of Plan Disqualification Cases With Related Cases of  
Plan Sponsors and Plan Participants

This refers to your memorandum dated May 3, 1989, requesting tax litigation advice with regard to the above matter.

We have reviewed the letters and the combined consent to extend and closing agreement you drafted. You noted that these documents were prepared in an effort to coordinate plan disqualification cases with the related cases of taxpayers whose tax liabilities will be affected by the disqualification of qualified plans under I.R.C. § 401(a) that did not make timely amendments to comply with the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), the Tax Reform Act of 1984 (TRA'84), and the Retirement Equity Act of 1984 (REA). You requested that we review the sufficiency of these documents for their intended purpose.

The first document is a letter to be sent to the plan participant advising the taxpayer that amounts contributed to a plan whose qualified status the Service proposes to revoke will be includible in income to the extent nonforfeitable under I.R.C. §§ 402(b) and 83. As can be seen from the revised draft of this document which we have attached (Attachment A), we suggest only minor nonsubstantive changes be made. We believe these changes help to clarify the message to the taxpayer.

We have made no suggested changes to the second document. This document is a letter to the plan sponsor that proposes disallowance of the deduction taken for contributions to the plan whose status has been drawn into question. We are satisfied that the letter sufficiently informs the plan sponsor of the effect on the deductions taken under I.R.C. §§ 162 and 404 of the Service's proposed revocation of the plan's qualified status under I.R.C. § 401(a). However, in view of the suggestion discussed below that you use a Form 872-A separately from the closing agreement, we suggest that this letter be revised slightly to reflect that the plan sponsor is executing a Form 872-A and the closing agreement.

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For reasons which we amplify below, we believe it is prudent to seek consents to extend the statute of limitations and to execute closing agreements through two separate documents. Given the fact that your district is on the cutting edge of the Service's compliance efforts with respect to nonamenders, we think that as a general rule the documents we use should conform as closely as possible to documents already established for the consent and closing agreement purposes. The fact that the nonamenders program is an innovative and unique program underscores the need to use documents which because of their similarity to existing forms make it easier for the Key District offices to process the forms, and for the public to recognize and accept use of the forms without challenge.

With regard to the third document entitled "SPECIAL CONSENT TO EXTEND THE TIME TO ASSESS TAX AND CLOSING AGREEMENT," we have several suggestions. However, before providing our comments on the document's language or scope, we would like to note that discussions are being conducted in the National Office with a view to providing guidance in the near future to the Key District employee plans personnel on the best use of the closing agreement in a nonamender case and limited National Office review of certain closing agreements in nonamender cases. Closing agreements are often used to compromise Service position where there are significant litigating hazards. However, as there are no significant litigating hazards in a nonamender case, the use of closing agreements in a nonamender case is desirable principally because it addresses the Service's administrative concerns over the volume of nonamender cases and the Service's and taxpayer's concerns about the resources needed to litigate each case separately.

In this vein we note more particularly that the execution of a closing agreement by the plan sponsor with respect to the deduction taken under I.R.C. § 162 and 404 for its contribution to the nonamending employee plan, by the trust for any income tax liability resulting from proposed revocation of the nonamending employee plan's qualified status under I.R.C. § 401(a), and by the plan participants for any income tax liability resulting from the plan's revocation, will ensure that the same issue, plan disqualification, is not litigated separately in multiple actions by these parties. We presently have docketed in the Tax Court a case in which we are asserting that the employee benefit trust is collaterally estopped from claiming that it is an exempt trust under I.R.C. § 501(a) when the employee plan to which it relates was disqualified under I.R.C. § 401(a) and certain employer deductions for contributions thereto were held to be nondeductible in a previous Tax Court case, T.C.S. Manufacturing, Inc. v. Commissioner, T.C. Memo. 1987-367.

Our first observation on the combined consent and closing agreement form you have provided is that the scope of the

document, although justifiable from the objective of administrative simplicity and convenience, is perhaps too broad. There are valid reasons for using the regular extension Form 872-A with minor modification <sup>1/</sup> as noted in our attached consent form (Attachment B) and a separate closing agreement form also attached (Attachment C).

As a practical matter, it is not clear that the same individuals in the District Director's office will be able to sign on behalf of the Service for purposes of executing the consent to extend the statute of limitations and the closing agreement. The consent form must be signed by District Directors and Assistant Regional Commissioners under Treas. Reg. § 301.6501(c)-1(d). Under Treas. Reg. § 301.7701-9 these individuals are allowed to redelegate to Regional Directors of Appeals, Service Center Directors, the Chief Counsel and Regional Counsels. In turn these individuals may redelegate and have done so under C.D.O. No. 42, Rev. 19, down to at least the Chief, Audit Branch in many districts.

Delegation Order 97 (Rev. 28) provides that the closing agreements may be signed by the Assistant Commissioner (Employee Plans and Exempt Organizations), District Directors and Regional Directors of Appeal. It provides for redelegation by the District Director only as low as the Chief, Quality Review Staff/Section. This is not the same person as the Chief, Audit Branch. Thus, there may be a need for further delegation of authority to have the Chief, EP Review Staff, accept the consents. Further, it is not completely clear that the Chief, EP Review Staff, would be entitled under Delegation Order 97 to sign the closing agreements simply because the Chief, EP Review Staff, is a position parallel with the Chief, Quality Review Staff, in the Examination function. However, given the fact that your district is presently conducting the special Form 1120 project involving nonamenders, it may be that the Chief, EP Review Staff, has been nominated or designated by the Cincinnati District Director to act for the purpose of the special Form 1120 nonamender project as the Chief, Quality Review Staff. This nomination or designation would arguably provide facial authority under Delegation Order 97 for the Chief, EP Review Staff, to

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<sup>1/</sup> We have only suggested Form 872-A be revised to provide a 180 day rather than a 90 day period of time for making the assessment after the events which lead to termination of the consent. The Service may need a longer period of time to make the assessments in nonamender cases given the fact that multiple cases may be under administrative consideration or in litigation with respect to one nonamending employee plan. Even if all taxpayers related to a single plan have executed the Form, it may still take time to coordinate all of the related assessments.

execute the closing agreements. 2/ We suggest that you determine whether such a nomination or designation exists in the Cincinnati District given the special Form 1120 nonamenders test project presently underway in that district.

Further, the nature of a consent form and a closing agreement is somewhat different. The closing agreement is not a contract which requires consideration to be binding. Rather, it is an agreement authorized under I.R.C. § 7121 in which the Service and the taxpayer are bound with respect to any internal revenue tax. I.R.C. § 7121(b) provides that the agreement shall be final and conclusive, and cannot, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact, be reopened, modified, annulled, set aside or disregarded.

The consent Form 872-A is a unilateral undertaking on the part of the taxpayer which is accepted by the Service and which may be terminated by the Service's termination of consideration of the tax matter, issuance of a notice of deficiency or a termination by the taxpayer of its undertaking on Form 872-T. In the combined consent form and closing agreement, there would be no stated way for the taxpayer to terminate its consent to extend the statute of limitations separately from the closing agreement particulars, as, for example, with a Form 872-T. This omission would produce confusion as to the exact effect of a taxpayer attempt to terminate the consent portion of the agreement. Thus, we recommend the separation of the consent form from the closing agreement. Nonetheless, we emphasize that the language in Form 872-A, the use of which we recommend in modified form, which instructs the taxpayer that termination of the Form 872-A can be accomplished by executing a Form 872-T, makes it critical for your office to ensure that there is a procedure in place in the Cincinnati District Director's office to track the limitations period and see that a statutory notice of deficiency is issued on a timely basis in any nonamender case where the taxpayer executes and files a Form 872-T.

You have specifically asked whether the absence of a specific deadline for assessment poses any problems for the validity of the consent form. Form 872-A is by definition an indefinite waiver of the limitations period. See Estate of Prudencio B. Camara v. Commissioner, 91 T.C. No. 60 (1988) (where full Tax Court unanimously held that Form 872-A waivers do not expire by operation of law after a reasonable period of time).

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2/ We note that an amendment to Delegation Order 97 is being prepared to clarify that the Chief, EP Review Staff, always had this authority in employee plans matters.

We have patterned the suggested closing agreement attached as Attachment C in part on the Form 906 closing agreement used for tax shelter limited partners whose distributive share of abusive partnerships' losses has been adjusted in accordance with adjustments to the partnership. We felt that the relation between the plan participants' income inclusion items and the plan disqualification was sufficiently analogous to that of the limited partner's adjustments and the abusive partnership adjustments to warrant using this as guidance. In this regard, we will be coordinating further with the tax shelter functions within the Service and this Office to determine whether the experience with tax shelters offers any further useful ideas for the nonamenders program which we will convey to your office. In addition, we used language from the combined consent and closing agreement form your office provided and from the Form 906 closing agreement used by the Assistant Commissioner (Employee Plans and Exempt Organizations) as to final determinations covering specific matters.

In closing, we should like to commend your efforts in coordinating with all affected functions of the Cincinnati District Director's office in establishing a nonamenders compliance program and ensuring that it operates effectively. It is precisely this global and farsighted approach which will be needed to implement the program successfully on a national basis.

Please call Sarah Hall or Calder Robertson (FTS 566-3407) if you have further questions.

MARLENE GROSS  
Assistant Chief Counsel  
(Tax Litigation)

By: *Sarah A. Hall*  
SARAH A. HALL  
Employee Plans Litigation  
Counsel  
Tax Litigation Division

Enclosures: 3  
Attachment A - revised letter to participant  
Attachment B - Form 872-A with minor change  
Attachment C - pattern closing agreement